UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SEVEN

HENDRICKSON TRUCKING COMPANY,

Respondent,

Cases: 07-CA-086624
07-CA-095591

and

LOCAL 164, INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT),

Charging Union.

RESPONDENT HENDRICKSON TRUCKING COMPANY'S BRIEF IN SUPPORT OF EXCEPTIONS

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I. STATEMENT OF FACTS

A. The Parties

The Company, a Michigan corporation, is a trucking company engaged in interstate freight shipping of aggregate materials. The Company's agents include Jim Hendrickson, President and Owner; Tom Hendrickson, Vice President; Ryan Hendrickson, Mechanic Supervisor; and Jack Dubrow, Treasurer.

The Union is a labor organization within the meaning of Section 2(5) of the Act. The bargaining unit is:

> All drivers, mechanics, mechanics helpers, and parts/utility employees employed by Respondent at or out of its facility located at 1077 South Toro, Jackson, Michigan, but exclusive of all guards and supervisors as defined in the Act.

Since about 1977, the Company has recognized the Union as the exclusive collective-bargaining representative of the bargaining unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from April 1, 2008 to March 31, 2012.

The Union employed Alan Sprague as its business agent on January 2, 2001, as President in 2004, and then relieved him of his duties on January 30, 2013. (Hearing Transcript ("Tr.") 34.) During the relevant timeframe, Tom Mathews served as the Union Steward and Recording Secretary. (Tr. 37.)

In 2002, there were approximately fifty employees in the bargaining unit. By the summer of 2012, the unit consisted of approximately twenty employees. (Tr. 161.)

B. The Procedural History

On April 16, 2016 the Board issued its Decision and Order remanding this matter. In its Order, the Board conceded that Respondent was correct in its argument that the Board lacked a

valid quorum at the time it originally approved Judge Dawson's appointment in April 2013. (Order, p. 1). The Board also held that its subsequent ratification of all administrative and personnel decisions made from January 4, 2012 through August 5, 2013 somehow cured the procedural deficiency. *Id.* Thus, under the Board's rationale, decisions made by an improperly appointed ALJ, who had no authority to preside, much less decide, any matter are made proper by virtue of a ratification of that ALJ's position over a year after she improperly presided over a trial.

Not surprisingly, after the remand, the ALJ "rubber stamped" her first decision. (Ratification, pp. 1-2.) Thus, the Recommended Decision and Order which is at issue continues to be the product of a hearing conducted by a person, with no authority to do so. It is still a decision issued by a person with no authority to do so.

C. The Parties' CBA And Request To Bargain

The last collective bargaining agreement ("CBA") between the parties was effective from April 1, 2008 through March 31, 2012. (Tr. 35; General Counsel Exhibit ("GC Ex.") 4, CBA.)

On January 4, 2012, pursuant to Article 30 of the CBA, the Company provided the Charging Union with notice of its intent to terminate the CBA on April 1, 2012. (GC Ex. 5.)

D. The Negotiations

1. February 27, 2012 − Meeting

On February 27, 2012, the Company and Union met to negotiate. (Tr. 37.) Tom Hendrickson, Ryan Hendrickson, and Jack Dubrow attended the meeting for the Company, and All Sprague and Tom Mathews attended for the Union. (Tr. 250.) During this initial meeting, the parties presented their proposals. (GC Exs. 7, 8.)

Specifically, The Company presented the Charging Union with a proposed CBA, which included insignificant language change of the current CBA and the following substantive proposals:

- Eliminate the employer match for the 401(k) (Tr. 39);
- Require a 25 percent contribution from the employees toward their health insurance premiums (Tr. 40);
- Calculate overtime with a 40-hour work week instead of an 8-hour day; and
- Eliminate the arbitration provision in the CBA and require disputes to be submitted to court (Tr. 47.).

(*See* GC Ex. 7.)

The Union's opening proposals included:

- Remove Article 2, Section 4 relating to super seniority with the steward;
- Revise the vacation selection provision to prohibit the Company from denying any vacation requested before April 30th of that year;
- Provide year-round health insurance coverage;
- Provide a tool allowance of $500 per year;
- Revise the arbitration provision to have hearings before the Western Michigan Industrial Board instead of the Aggregate Carriers Association; and
- Increase wage rates and new hire wage rates.

(GC Ex. 8.)

2. Review of Company's Financial Records by Union's Accountant

The Company agreed, upon the Union's request, to allow the Union's accountant to review the Company's financial records before they continued negotiations. (Tr. 49.) Gary Kushner, the Union's accountant, and his assistant met with Jack Dubrow. (Tr. 332.) Mr. Kushner requested three years of the Company's tax returns. The Company, nonetheless,

provided Mr. Kushner with five to six years of its tax returns. (*Id*.) Mr. Kushner did not request any other financial documents from the Company. (*Id*.)

On March 31, 2012, Mr. Kushner sent the Union his report on the Company's finances. (GC Ex. 27.) The Union refused to provide the Company with a copy of this report. (Tr. 332-33.) Even Mr. Mathews did not see the Union's own auditor's report. (Tr. 318.)

3. April 10, 2012 - Meeting

The Company and Union met for the second time to negotiate on April 10, 2012. (Tr. 59.) The parties worked through their proposals and marked their tentative agreements. (Tr. 60; GC Ex. 9.) The parties' tentative agreements are marked in GC Exhibit 9.

The Company also made concessions. For example, the Company agreed to the Union's proposal to delete the provision related to selection of vacation days and notice of vacation. (GC Ex. 9 at 5.)

4. April 13, 2012 – Union Proposal

Following this meeting, on April 13, 2012, Mr. Sprague had faxed the Union's revised proposals to the Company. (Tr. 75; GC Ex. 10.) The proposals included:

- One-year contract;
- Freeze of wages;
- All healthcare premiums including the annual increase to be paid by the Company; and
- Contract to include all tentative agreements made at the April 10, 2012 meeting.

(GC Ex. 10.) The Union did not make any proposals regarding the Company's request to eliminate the 401(k) match or revise the overtime calculations. (*See* GC Ex. 10.)

5. April 25, 2012 - Meeting

The Company and Union met in person on April 25, 2012. During this meeting, the Company provided its updated proposals, which incorporated the parties' tentative agreements from April 10, 2012. (GC Ex. 11.) The Company also agreed to the Union's proposal to remove the super seniority for the steward. (*Id.* at 2.)

In its updated proposals, the Company continued to request elimination of the 401(k) match and revision to the overtime calculation so that it would be triggered after 40 hours per week rather than 8 hours per day. (Tr. 265; GC Ex. 11.) The Company also amended its original proposal relating to healthcare contributions and reduced the employee contributions from 25 percent to 20 percent. (GC Ex. 11 at 9.)

6. April 27, 2012 – Company Proposal

Following this meeting, on April 27, 2012, the Company sent the Union its updated proposals, which incorporated the changes agreed upon to-date by the parties. (Tr. 87; GC Ex. 12.) The parties, however, had not reached an agreement on the following proposals:

- Dispute resolution;
- 401(k) match;
- Overtime calculations with a 40-hour work week; and
- Employee healthcare contributions.

(GC Ex. 12.)

7. The Union's Vote on the Company's April 27, 2012 Proposals

Mr. Sprague testified that on April 29 or 30, 2012, he presented the Bargaining Unit with the Company's proposals dated April 27, 2012 (*see* GC Ex. 12) for a vote. (Tr. 88, 90.) The Bargaining Unit voted to reject the Company's proposals. (Tr. 89.)

Mr. Sprague also took a vote by secret ballot of the members to determine whether the Bargaining Unit was willing to strike, which passed by an "overwhelming vote." (Tr. 89, 267-68.)

The Bargaining Unit also took a third vote to pre-ratify the Union's proposals. (Tr. 90.) The Union's pre-ratified proposal included the following terms:

- One-year contract;
- Acceptance of the status quo with freeze in wages; and
- Annual increase in healthcare premiums to be paid by employees, amounting to $15 for each employee.

(Tr. 90-91, 267-68.) Again, the Union did not make any counter-proposals to the Company's request to eliminate the 401(k) match or revise the overtime calculations. (*See id*.)

8. May 1, 2012 - Meeting

On or around May 1, 2012, Mr. Sprague testified that he presented the pre-ratified proposals to the Company following the Union's vote. (Tr. 91.) Mr. Sprague and Tom Hendrickson had a telephone conference, during which Mr. Sprague explained the Union's pre-ratified proposals. (*Id*.) The Company considered these proposals and rejected them. (Tr. 92.)

9. May 16, 2012 - Meeting

On May 16, 2012, the parties met in person and brought in a federal mediator, Kevin Brahaney, pursuant to the Company's request. (Tr. 92-93, 95, 269.)

As Jack Dubrow testified, during this meeting he provided everyone, including Mr. Sprague and Mr. Mathews, with copies of a spreadsheet reflecting eight years of the Company's

finances – with the understanding that they would return the spreadsheets to him at the end of the meeting.[1] (Tr. 325, 329; Respondent's Exhibit ("R. Ex.") 31.)

According to the Company's accounting records, the Company suffered a loss of $138,700 in 2011.[2] (R. Ex. 31.) Mr. Sprague's testimony also confirmed that during this meeting, he requested the specific cost-savings related to each of the Company's proposals. (Tr. 99, 209 (emphasis added).) Everyone, Company and Union witnesses alike, agreed that Mr. Dubrow informed the Union that $40,000 attributable to health care, $25,000 attributable to overtime, and $20,000 attributable to the 401(k) match. (Tr 69, 273, 341.)

Mr. Dubrow further testified that following his review of the financial information, Mr. Sprague stated that the "Union wasn't going to continually make concessions for this company if it looks like were [sic] losing – a losing company [sic] then maybe they should just close." (Tr. 330.) Mr. Sprague even admitted: "[B]ecause I was upset and frustrated with everything that was going on, and I may have said, '**You know, maybe it's better off just close everything up and nobody has to work**.'" (Tr. 411 (emphasis added).)

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[1] Tom Hendrickson confirmed that the spreadsheet at R. Ex. 31 was provided to the Union at the May 16, 2012 meeting. (Tr. 370.)

[2] The Company had not yet filed its tax returns for 2011, so the 2011 calculations in the spreadsheet were based on the figures generated by the Company's accounting system. (Tr. 327-28.) Moreover, the Union incorrectly believed that the 2011 loss was attributable to the Company's purchase of real estate. The loss reflected in the spreadsheet for the Company had nothing to do with the purchase of real estate. Hendrickson Realty, a separate entity that leases the facilities to Hendrickson Trucking, purchased real estate upon which Hendrickson Trucking was storing materials. (Tr. 355-57.) Therefore, the purchase of this real estate would not have been reflected in the Company's financial records, nor taken into account for any profits and losses of the Company. (*Id*.)

10. May 21, 2012 - Meeting

The parties met again with the mediator to negotiate on May 21, 2012. (Tr. 95.) This was their fifth in-person meeting, during which the Company presented its updated proposals. (GC Ex. 13.)

The Company's proposals continued to include the following items:

- Removal of arbitration in favor of court;
- Elimination of 401(k) match;
- Revision to overtime calculations (to base it on 40 hours per week); and
- Addition of healthcare contributions from the employee.

(GC Ex. 13; Tr. 95-96, 270.)

The Union, however, did not make any changes on its positions on 401(k) match, employee healthcare contribution, overtime, or dispute resolution.

11. May 23, 2012 - Proposal

Following this meeting, on May 23, 2012, the Company sent the Union its revised proposals that provided two options for the Union to consider and select:

- Option 1 – healthcare contributions from the employees would be 15 percent of the premiums for drivers and 13 percent of the premiums for mechanics; inclusion of the 180 day-waiting period for healthcare coverage for new hires; and elimination of 401(k) match.
- Option 2 – inclusion of the vacation selection and notice provisions; employee healthcare contributions would be reduced to approximately 10 percent; inclusion of 180 day-waiting period for healthcare coverage for new hires; reduction of the period of time employees that receive healthcare coverage following layoff to two weeks; and a reduction with the 401(k) match.

(GC Ex. 14.)

Around May 24 or 25 2012, Mr. Sprague met with the Bargaining Unit and presented the Company's two options. The Union voted to reject both of those options and made no counter-proposal. (Tr. 102-03.)

12. May 30, 2012 Negotiations – Meeting

On May 30, 2012, the parties held their sixth meeting, during which the Company presented its last best offer for the new contract to become effective on Monday, June 4, 2013. (GC Ex. 15.) The mediator also attended this session. (Tr. 106, 110.)

The Company's proposals incorporated Option 1 from the May 23, 2012 proposals (*see* GC Ex. 14.), which included the following:

- Removal of arbitration in favor of court;
- Elimination of 401(k) match;
- Revision to overtime calculations to a 40-hour work week; and
- Addition of healthcare contributions from the employee, amounting to 15 percent of the premiums for drivers and 13 percent of the premiums for mechanics.

(GC Ex. 15.) The last best offer also incorporated all of the parties' tentative agreements from the April 10, 2012 meeting. (*See* GC Ex. 9; *compare* GC Ex. 15.)

At the May 30, 2012 meeting, the Union rejected the Company's offer and made no counter-proposal. (Tr. 108, 113.)

E. Impasse And Implementation

1. June 4, 2012 - Eleventh Negotiation and the Company's Last Best and Final Offer

On June 4, 2012, the Company sent its last best and final offer to the Union for the new contract to become effective Monday, June 11, 2012. (GC Ex. 16.) The Company removed the contractual requirement that an action to enforce the CBA must be brought in the United States

District Court for the Eastern District of Michigan. The final proposal allowed the parties to resort to "whatever judicial remedy may be available" after exhausting the grievance procedure. (GC Ex. 16.) Notably, the main proposals in dispute remained the same. Tom Hendrickson noted:

> At the mediation meeting held on May 30, 2012, the Company submitted you its last offer. You rejected our offer. We understand that the basis for your rejections is that you are unwilling to agree to our proposals on 401(k) contributions, health insurance, overtime, and the grievance procedure. **In fact, throughout our negotiations you have maintained your position that you are insisting that the language of the most recently expired agreement be continued on all of those subjects**.

Id. (emphasis added).

On June 8, 2012, Mr. Sprague rejected the Company's last best and final offer. (GC Ex. 17.)

2. The Company's Notice of Implementation

In a letter dated June 8, 2012 (with a fax date of June 11, 2012), Tom Hendrickson notified the Union that the parties had come to an impasse and that the new contract would be implemented. (GC Ex. 16.)

3. June 13, 2012 – Meeting and the Union's Final Proposal

On June 13, 2012, the parties met for their seventh in-person meeting, during which the Union presented its proposal entitled "Final Proposal." (GC Ex. 18; Tr. 123.) When he presented this proposal, Mr. Sprague informed Mr. Hendrickson that the Company's last best and final offer was voted upon and "**was completely unacceptable to the Union**." (Tr. 376 (emphasis added).) Mr. Sprague also stated, "Here you go; this is our last final offer." (*Id*.)

The Union's final proposal stated:

Teamsters Local 164

Final Proposal

June 13, 2012

OPTION I

1. One (1) year contract extension
2. Employees shall contribute fifteen (15) dollars per week toward Health Care. Money shall be taken out of employees pay weekly on a pre-tax basis.

OPTION II

1. One (1) year contract extension
2. Employees shall contribute fifteen (15) dollars per week toward Health Care. Money shall be taken out of employees pay weekly on a pre-tax basis.
3. Add "OPT OUT" Health Care to CBA (copy attached)
4. Replace grievance procedure with the new language (copy attached)

OPTION III

1. ***Work Stoppage***

Indeed, Mr. Sprague testified that he informed the Company "**that there was no way that this was going to be – their offer was going to be accepted**." (Tr. 123 (emphasis added).)

4. The Proposals that Resulted in Impasse

Of these four issues that separated the parties at the time they each provided their final offers, three were primarily economic. And for each of those, the Company was trying to achieve cost savings. It should not be surprising that the Company was trying to save money. Admitted as Respondent's exhibit 31 is a spreadsheet which summarizes the Company's financial performance from 2004-2011. The Company lost money in all but two of those years. It lost $138,000.00 in 2011, the year immediately preceding the negotiations. It made $136,000

in 2010. (Tr. 367, R-31.) But that was only because there had been an oil spill in the area and the Company was awarded a profitable one-time job working on the superfund clean-up. (Tr.163, 217.)

Respondent's Exhibit 31 was a summary based on business records. It was admitted without limitation. Did the ALJ rely on this document to make her findings regarding the Company's financial position? No, she relied on the Union accountant's report. Here is how that document was offered and admitted:

> Ms. Fedewa: And your honor, I would move in GC-27 as to – not the truth of the matter asserted, but as to what [Mr. Sprague] relied upon in order to make his conclusions and do his bargaining.
>
> Mr. Ryan: In that case, no objection.

Thus, she relied on the truth of the matter asserted by a document that was specifically offered "not for the truth of the matter asserted." The ALJ also says the report was uncontroverted, but at page 31 of the transcript Tom Hendrickson testified that it was inaccurate.

a. Elimination of the 401(k) Match

The Union acknowledged that the Company calculated a cost-savings of approximately $20,000 with eliminating the 401(k) match. (Tr. 99, 209.) Mr. Dubrow testified that he computed and paid the match for the 401(k), so he reviewed the amount of payments made for the prior two years. (Tr. 341.) Approximately eleven employees participated in the 401(k) program. (Tr. 362.) The cost-savings also included eliminating the match for management. (Tr. 344.)

During negotiations, the Company modified its original proposal of completely eliminating the 401(k) match to include language that the 401(k) match would be eliminated until the Company became profitable. (Tr. 300.)

The Union, however, rejected any elimination of the 401(k) match throughout the course of negotiations, and it never made its own proposal pertaining to the 401(k). (*See, e.g.*, GC Ex. 18.) Indeed, Mr. Mathews testified that the "employees had had it with giving back." (Tr. 296.)

b. Employee Healthcare Contributions and Opt-Out Language

The Union acknowledged that the Company calculated a cost-savings of approximately $40,000 with employee contributions toward their healthcare premiums. (Tr. 99, 209.)

During the course of negotiations, the Company reduced its initial proposal on employee healthcare contributions from 25 percent to 15 percent. With the 15-percent contribution, employees would pay approximately $42.00 per week. (G.C. Ex. 15 at 12.) The Union continued to reject the 15-percent proposal. (Tr. 291-92.)

The Union made two counter-proposals in lieu of accepting the 15-percent employee contributions. First, the Union proposed paying the annual increase of the premium, which was $15 per week for each employee. The Company rejected this proposal as it did not meet its cost-savings needs.

Second, the Union proposed opt-out language in the CBA for employees to opt-out of the health insurance coverage, but the Company determined that the opt-out language would not be an effective means of cost-savings. Mr. Sprague admitted that any cost-savings for the Company depended on whether employees actually decided to opt out as the Company cannot force the employee to do so. (Tr. 200.) The Company and the Union both did not know how many employees would apply to opt out. (Tr. 338.) Mr. Sprague also admitted that any cost-savings for the Company depended on whether the Michigan Conference Teamsters Welfare Fund ("Fund") approved an employee's application to opt out. Mr. Sprague agreed that there were "no guarantees." (Tr. 202.)

In fact, the Company had first-hand knowledge of the failure to save costs with the inclusion of opt-out language. In 2010, the Company allowed employees to opt out of the health insurance coverage. (Tr. 335.) Six employees applied to opt out. Of those six, five applications were rejected by the Fund. One employee qualified to opt out; however, after six or eight weeks, the Company received a letter stating that there was an error committed in the Fund's understanding of Section 125 of the Internal Revenue Code and that the employee could no longer opt out. (*Id*.)

c. Overtime Calculations Based on 40-Hour Weeks

The Union acknowledged that the Company calculated a cost-savings of approximately $25,000 with calculating overtime with a 40-hour work week. (Tr. 99, 209.) Mr. Dubrow calculated the cost-savings for overtime by reviewing the employees' time on the payroll system for the last couple of years and computing what their pay would have been with overtime after a 40-hour work week. (Tr. 342.) The Union never agreed to the overtime proposal, nor did it make any counter-proposals on this issue.

d. Revision of the Grievance and Arbitration Procedure

The Company sought to keep the grievance procedure in the CBA the same and eliminate the arbitration provision. Specifically, the Company wanted disputes settled in court instead. (Tr. 371.) Tom Hendrickson, who is licensed to practice law in the State of Michigan, testified that court would be more fair and cost-effective:

> Well, I felt like going to court would be a lot more simpler, it would be a lot more fair. There's electronic filing. There's teleconferences with the judges ... but there's teleconferences for status conferences, pretrials and different things which would mean that we wouldn't have to travel anyplace, so that's even cheaper yet, and the overall cost would be a lot less than just going to arbitration, and also if you weren't happy with the judge's decision, ultimately it could be appealed.

(Tr. 374.) Mr. Sprague further acknowledged the reasoning behind the Company's proposal to eliminate the arbitration provision: "... [A]s counsel [Tom Hendrickson] felt that because he's an attorney, that I guess going to trial he could handle it better than with an arbitrator." (Tr. 49.)

The Union, however, insisted on arbitration. (Tr. 372.)

F. June 25, 2012 Strike

On June 25, 2012, the Union went on strike following the Company's implementation of the new contract. (Tr. 126, 284.) Mr. Mathews testified that the decision to strike was made by the Union on April 30, 2012 when the Union voted down the Company's proposals and voted to strike if the Company decided to implement its offer. (Tr. 284.)

One of the members of the Union, Scott Hawkes, testified about the Union's demand to keep the status quo and the reasons for the strike:

> Q. And you knew you would be willing to strike to get what you wanted in the contract?
>
> A. We didn't want anything. We just didn't want anything taken away. We didn't ask for anything.
>
> Q. You were willing to strike to keep the old contract in force?
>
> A. Yes.

(Tr. 245.)

G. Post-Impasse Meetings And Communications

1. July 26, 2012 Negotiation Per Union's Request

On July 26, 2012, the parties met to discuss the Company's proposals and its implementation.[3]

[3] The parties stipulated that they had eight in-person meetings during the course of negotiations on the following dates: (1) February 27, 2012, (2) April 10, 2012, (3) April 25, 2012, (4) May 16, 2012, (5) May 21, 2012, (6) May 30, 2012, (7) June 13, 2012, and (8) July 26, 2012. (Tr. 227-28.)

This meeting was scheduled when Mr. Bernard, who was handling matters while Mr. Sprague was on medical leave, informed either Mr. Hendrickson or Mr. Dubrow that the Union was willing to meet. (Tr. 127.) Mr. Sprague testified that he instructed Mr. Bernard to schedule a meeting through the facilitator. (Tr. 128.) Mr. Mathews further testified that he later "sorted out" who had asked for the July 26th meeting:

> Q. All right. Did you ever sort out whether Mr. Bernard had asked for that meeting or not?
>
> A. Yes, I did.
>
> Q. What --
>
> A. Mr. Bernard told Mr. Hendrickson we were ready to meet at any time. Mr. Hendrickson misunderstood, and there was, the misunderstanding was that the Union requested that meeting. He called -- I don't know who called -- the Company called the Union and asked for a meeting. Mr. Sprague set up that meeting for the 26th with Mr. Brahaney being present. At the end of that meeting to avoid any more misunderstanding, it was decided that all future meetings would be scheduled through Mr. Brahaney.
>
> Q. All right, so it sounds like the Union thought the Company asked for the meeting, the Company thought the Union asked for the meeting?
>
> A. Yes, sir.

(Tr. 294.)

At the July 26th meeting with the mediator, neither party presented any new proposals. (Tr. 293-94, 298.) The meeting concluded when both parties realized that neither intended to present any new proposals, and it had apparently been mistakenly convened.

2. The Union's November 30, 2012 Offer to Return to Work and the Company's Response

On November 30, 2012, Mr. Sprague sent the Company a letter indicating that the members of the Bargaining Unit were "unconditionally" offering to return to work on

December 3, 2012. (GC Ex. 21; Tr. 141-42.) In a separate letter dated that same day, the Union also identified eleven members who were taking a voluntary layoff. (GC Ex. 22.)

Lastly, the Union sent a third letter dated November 30, 2012 to the Company requesting to meet. (GC Ex. 23.) The Union's letter conditioned its willingness to meet on the basis that the Company rescind its implementation of the new contract and return to terms and conditions of the prior CBA, and recall the strikers. (*Id.*)

That same day, the Company responded to the Union's "unconditional" offer to return to work, informing the Union that there would be no work available for any returning strikers. (GC Ex. 24.) The Company further stated that it would evaluate its workloads and manpower and contact the Union in the very near future. (*Id.*)

On December 10, 2012, the Company informed the Union that because it was entering the winter slow-down, the Company could complete its work with the permanent replacement employees. (GC Ex. 25.) The Company also stated that the strikers who offered to return to work would be placed on a preferential hire/recall list based upon seniority. (*Id*.)

H. The Union's Information Requests And The Company's Response

1. July 31, 2012 Grievance and Information Request Regarding AGG Trucking, LLC

On July 31, 2012, the Union sent the Company a grievance and information requests related to AGG Trucking. (GC Ex. 20.) The information requests mainly sought information pertaining to the corporate structure of AGG Trucking and its relationship to the Company and information pertaining to its employees. (Tr. 140.) These requests also were similar to the subsequent information requests sent by the Union on December 27, 2012. (GC Ex. 20; R. Ex. 11.)

During the strike, the Company used the name of AGG Trucking to disguise its trucks. (Tr. 375.) Mr. Hendrickson testified that the drivers of the trucks were afraid that they would get into an accident while driving because the strikers were following the trucks and harassing the drivers. (*Id.*) Mr. Hendrickson admitted that the attempt "was a complete and utter failure." (*Id.*)

2. The Company's Response to the Information Requests

On January 9, 2013, Mr. Ryan, on behalf of the Company, responded to both the July 31st and December 27th information requests. (R. Ex. 12.)

In its response, the Company stated:

> If the purpose of those questions is to gain evidence to establish that Hendrickson Trucking and AGG Trucking are a single employer, you should know that Hendrickson Trucking does not dispute that they are. Whether replacement drivers operated a truck that stated AGG or a truck that stated Hendrickson, they were always employed by Hendrickson and they were always paid by Hendrickson, so it appears that there cannot be any legitimate issue about the relationship between those entities.

(R. Ex. 12.) The response also provided, among other things, the names of the permanent replacement employees, their hire dates, the seniority list for the strikers, and the identity of the managers who performed work during the strike.

3. The Union's Waiver of Any Alleged Obligation of the Company to Further Respond

On April 10, 2013, during the negotiations between the Company and the Union, Mr. Ryan asked Mr. Canzano whether any information requests were still outstanding. (Tr. 395.) Mr. Canzano responded that what the Union still requested was the Company's payroll information. (*Id.*) Mr. Ryan provided the payroll information to Mr. Canzano. (*Id.*)

Moreover, Mr. Mathews testified that that the Union no longer needed any information about AGG Trucking once it received the January 9, 2013 letter: "After I got the letter from him,

no, I didn't need the information anymore, I don't believe." (Tr. 213.) Mr. Mathews explained that the Union no longer needed the information because the Company removed the name "AGG Trucking" from the trucks. (*Id.*)

I. The ALJ's Credibility Determinations

Every fact recited above is undisputed. There are two areas of alleged factual disputes. The first is whether the Union asked at every bargaining session for the Company to provide it detailed financial information concerning its proposed cost savings and the Company failed to answer. The second factual dispute is not really a dispute at all. But the ALJ tries to manufacture one by crediting testimony that does not exist on the question of whether the Union declined to bargain in December of 2012.

1. The Company's Response to the Union's Questions About Cost Savings Attributable to its Proposals.

While it was never charged as an unfair labor practice, and while it is not the subject of any paragraph of the two complaints issued in this case, the ALJ makes it the centerpiece of her finding that the parties could not have been at impasse and that the strike was therefore an unfair labor practice strike. Indeed, at page 27 of her Opinion, she specifically finds that the Company's failure to provide the requested financial information constituted separate violation of § 58(a)(1) and 8(a)(5) of the Act. Thus, the ALJ found a violation where one was never charged and concerning which no complaint was ever issued.

The ALJ's discussion on this point begins at page 24 of her Decision, and it appears under the heading "Respondent's Failure to Provide Information During Bargaining Precluded Impasse." Here is how the ALJ describes the information request on which she basis her conclusion that the Company failed to provide the requested information:

> The General Counsel alleges that Respondent failed to furnish it requested financial documentation to show how it reached its

> estimated cost savings totals for its newly proposed formula for employee contributions to health and welfare premiums, elimination of the 401(k) employer match, and revision of overtime calculations.[4]
>
> * * *
>
> While bargaining for a new contract in this case, the Union requested that Respondent furnish it with the calculations and financial information showing how it arrived at its cost saving totals for each of its proposals for the reduction in employer paid health and welfare premiums, elimination of the 401(k) employer match, and reduction in wages (overtime recalculated to begin after 40 hours rather than 8 hours).

To read the ALJ's Opinion, one would get the impression that there was evidence in the record to show that the Union made a specific and detailed request for financial data and documentations concerning specific calculations that the Company made. Of course, there is no evidence to support the impression that the ALJ apparently wants to create.

The ALJ's decision to find an unfair labor practice on this topic, over which the Union never even filed a charge, is based on her decision to credit testimony of Union witnesses Al Sprague and Tom Matthews over the testimony of Company witnesses Jack Dubrow and Thomas Hendrickson. The competing testimony is as follows:

- **Union Testimony**

The testimony of Sprague and Matthews was that at every single bargaining session, the Union asked for the Company to provide "information," "comparisons," "numbers," "something" to show the cost savings that it attributed to each of its contract proposals.

- **Company Testimony**

The Company's testimony was that Al Sprague asked how much cost savings the Company attributed to each of the three remaining proposals – 401(k) reduction, the insurance

[4] There is no such allegation.

reduction, and the overtime reduction. Mr. Sprague asked for the cost savings attributable to each of those items. Mr. Dubrow in response to the verbal question gave a verbal answer and told him that the Company estimated that they would save $20,000 based on the 401(k) reduction, $25,000 based on the insurance reduction, and $40,000 based on overtime change. The Union was satisfied with the answer and never raised the issue again or asked for any other additional information concerning this cost savings question. (Tr. 340-345.)

Of course the ALJ credits the Union's version that Mr. Sprague asked for this information at every single meeting and it was never provided. In crediting this testimony, she, without any sensible explanation, discredits the mountain of additional evidence in the record which shows that the Company's witnesses gave the accurate testimony on this point and the Union's did not. Here is the evidence that makes up that mountain:

a. Affidavit of Al Sprague

On August 14, 2012, Al Sprague gave his affidavit to the National Labor Relations Board to support the unfair labor practice charges he filed. In that affidavit, Mr. Sprague detailed the discussions that took place at each of the bargaining sessions. The only time Mr. Sprague's affidavit mentions any request that the Company provide information regarding the cost savings it intended to realize in its proposals was in his description of the May 30, 2012 bargaining session. There is no reference to any such request in Mr. Sprague's description of any of the other bargaining sessions. That's right. Mr. Sprague's affidavit to the NLRB is entirely consistent with the Company's testimony on this point and entirely inconsistent with his and Mr. Matthews' testimonies. (Tr. 173-174.)

b. Affidavit of Thomas Matthews

Mr. Matthews also gave an affidavit to the NLRB in connection to the unfair labor practice charges the Union filed. In that affidavit, he detailed what occurred in each of the

negotiation sessions. Just like Mr. Sprague's the only reference in Mr. Matthews' affidavit to any request for information about cost savings was at the May 30, 2012 meeting. That's right. Mr. Matthews' affidavit is entirely consistent with the testimony of the Company's witness entirely inconsistent with his and Mr. Sprague's testimonies. (Tr. 300-304.)

c. The Union's Bargaining Notes

Mr. Matthews' took the Union's notes at each of the bargaining sessions. He testified that he recorded what went on at each bargaining session so he could remember what occurred at each bargaining session. In Mr. Matthews' bargaining notes, just like in his and Mr. Sprague's affidavits, the only mention of any request for information concerning cost savings is at the May 30, 2012 bargaining session. That's right. The Union's bargaining notes are entirely consistent with the Company's testimony and entirely consistent with Mr. Sprague's and Mr. Matthews' affidavits, but entirely inconsistent with Mr. Sprague's and Mr. Matthews' testimonies. (*Id*.)

d. The Lack of a Written Request

This Union is not shy about requesting information. Mr. Sprague knows how to do it. General Counsel's Exhibit 20, and Respondent's Exhibit 11 are two written information requests he made. General Counsel's Exhibit 20 includes 48 separate itemized requests. Respondent's Exhibit 11 includes 45 separate itemized requests. These demonstrate that when Mr. Sprague wants information he makes written requests and he does so in a detailed manner. The fact that there was no written request for the information that the Union says it continually asked for throughout negotiations is just one more strong indication that Mr. Sprague's affidavit, Mr. Matthews' affidavit, Mr. Matthews' bargaining notes, and the testimonies of Jack Dubrow and Thomas Hendrickson are accurate, and the testimonies of Mr. Sprague and Mr. Matthews are not.

e. There is no Unfair Labor Practice Charge

Mr. Sprague also knows how to file unfair labor practice charges. Counting the amendments, he did it five times in this case and two of those charges included allegations that the Company failed to provide requested information. Yet the first time anyone raised this claim that the Union made repeated requests for information during bargaining, and that the Company refused to give it is when Mr. Sprague gives his testimony at the trial. The fact that this claim was never made until the trial is just one more strong indicating that Mr. Matthews and Mr. Sprague are wrong, but their affidavits and bargaining notes are right.

2. The Union Refused to Bargain After December 2012

By letter dated November 30, 2012, Mr. Sprague offered to meet on the condition the Company recall the strikers to work and rescind its implemented offer. The Company's attorney, Mr. Ryan, spoke to Mr. Sprague by telephone about his offer to meet.

Here is Mr. Ryan's testimony about that phone call:

> Q. And did you respond to Mr. Sprague about this letter? A. Yeah. Mr. Sprague and I had been involved quite extensively on some other matters for a different client of mine during the late summer/fall of 2012, and so we had been in regular contact I think during that period of time, so when I got this letter, 1 called him. I believe I called him. I know there was a telephone call. I assume I called him. He could have called me about something else, I don't know, but we were on the telephone, and I raised this 'letter with him, and I, if you read the letter basically, it offers, it says that the Union wants to meet and get some bargaining dates, but it also says that the Union is requesting that the Company call back permanent, call back strikers and that the Company re-implement its prior contract, you know, the Company had implemented its last proposal and this letter asks that it go back to the pre-implementation status quo. So during the telephone call I told Al we'd meet with him, but I wasn't clear whether you were saying you'll only meet with us if we do those two things or you'll meet with us anyway, but we weren't going to do either of those things, Hendrickson was not going to recall the strikers at

> that time, didn't have work for them and wasn't going to re-implement the old status quo. Mr. Sprague told me, he said, you know, there'd been an unfair labor practice charge, and that was the remedy, and we were going to have to do that anyway, and I said, "Well, we're going to, you know, have a trial over those issues I assume, and we're going," you know, our position is that we didn't have to do those things, but we weren't going to do them now, at that time. And Mr. Sprague then said, "Well, then just forget about it. We'll let the Labor Board figure it out," which I assume meant that he didn't want to bargain if we didn't do those two things.
>
> Q. And when was this telephone call?
>
> A. This call would have been shortly after I received the letter. I -- it would have been probably sometime during the week of the first week in December. This letter would have gotten to me shortly after November 30th, and I would have had my conversation with Al shortly thereafter.

(Tr. 385-386.)

The ALJ decided to credit Mr. Sprague's testimony over Mr. Ryan's concerning this. Thus, one might assume that Mr. Sprague gave some contrary testimony. But one would be wrong. Here is Mr. Sprague's testimony:

> Judge Dawson: The question that I – I don't know a question that might be asked of the witness, maybe, you know, which hasn't been asked, I don't think, you know, are you saying the telephone conversation didn't exist or are you saying you didn't recall having a conversation, and that's all we need
>
> Mr. Ryan: Okay, then I'll ask that question.
>
> Judge Dawson: Okay.
>
> Question by Mr. Ryan: The conversation I talked about with you that I recall happening in September and you didn't recall.
>
> A: I remember not recalling.
>
> Q: Right. Are you saying it didn't happen or are you saying you don't recall?
>
> A: I don't recall.

Thus, there was not any contrary testimony to credit. There were, however, three things Mr. Sprague did which corroborates Mr. Ryan's testimony. He sent separate letters to the Company dated December 11, 2012 (GC 26), and December 27, 2012 (R-11). He sent another letter to Mr. Ryan dated January 22, 2013. All of these letters addressed issues related to collective bargaining, but none of these made any reference to meeting to negotiate or reiterated any request for dates. In other words, they are entirely consistent with Mr. Ryan's undisputed testimony that in early December 2012, Mr. Sprague declined to meet because the Company would not meet his pre-conditions.

II. SPECIFICATION OF QUESTIONS INVOLVED

1. Whether the Supreme Court's decision in *National Labor Relations Board v Noel Canning* precludes the Board from issuing any order in this case.

   (Exceptions 57, 58, 59)

2. Whether the ALJ's finding that the company violated Section 8(a)(1) and (5) by failing to provide requested information during bargaining is both legally and factually deficient.

   (Exceptions 7, 9, 10, 11, 12, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35)

3. Whether the fact that there was no charge or complaint issued alleging that the Company failed to provide information during bargaining precludes any finding that the Company committed such unfair labor practice.

   (Exception 60)

4. Whether the ALJ's credibility resolution is unsupported by the record and is lacking in any reasoned analysis.

   (Exceptions 7, 9, 10, 11, 12, 18, 19, 20, 21, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 50, 51, 52, 53)

5. Whether the Company bargained in good faith to impasse.

   (Exceptions 8, 39, 40, 41, 42, 43, 44)

6. Whether the Company's proposals did not evidence bad-faith bargaining.

(Exceptions 36, 37, 38)

7. Whether the Company lawfully implemented its own proposals after the parties reached true impasse.

(Exceptions 13, 14, 15, 16, 35)

8. Whether the Company continued to bargain in good faith following impasse.

(Exceptions 18, 19, 20, 21, 50, 51, 52, 53)

9. Whether the Company violated Section 8(a)(1) and (3) by not immediately reinstating economic strikers.

(Exceptions 45, 46)

10. Whether the Company violated Sections 8(a) and (a)(5) by not responding to information requests.

(Exceptions 17, 47, 48, 49)

III. ARGUMENT

A. The ALJ's Finding That The Company Violated Section 8(a)(1) And (5) By Failing To Provide Requested Information During Bargaining Is Both Legally And Factually Deficient

From pages 24-28, the ALJ provides her "analysis" for her conclusion that the Company violated its bargaining obligation by failing to provide the Union requested information about its cost savings calculations during the course of bargaining and that by committing this unfair labor practice a valid impasse was precluded.

Of course there are very significant problems with the ALJ's decision. The first is the Union never filed any charge to support this finding of an unfair labor practice and there was never a complaint issued which alleged any such unfair labor practice. Second, the ALJ's decision is based on what can only be described as a nonsensical credibility determination.

1. The Fact That There Was no Charge or Complaint Issued Alleging That the Company Failed to Provide Information During Bargaining Precludes Any Finding That the Company Committed Such Unfair Labor Practice

While the consolidated complaint only identifies two case numbers, the Union in fact filed charges five times. It filed its first charge on August 3, 2012, and then amended that charge twice. It filed a second charge on December 27, 2012 and then amended that charge once. In all of this, the Union never charged that the Company failed to provide requested information about cost savings calculations during bargaining. There were a complaint and amended complaint in this case. Neither alleges that the Company violated the Act by failing to provide any financial information during the course of the bargaining.

Both the Administrative Procedures Act and the Board's own rules require that a complaint properly inform the charged party of any asserted violation. 5 USC § 544(b)(iii); 29 CFR § 102.15. The Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent hearing. *George Banta Co v NLRB*, 222 U.S. App DC 288, 686 F2d 10, 17 (DC Cir. 1982). For example, in *United Parcel Service, Inc. v NLRB*, 706 F2d 972 (3rd Cir. 1983), the court described the general legal requirements.

> Even where evidence supporting a remedial order is in the record, courts have refused to grant enforcement of a Board order in the absence of either a supporting allegation of a complaint, or a meaningful opportunity to litigate the underlying issue for the ALJ. See, e.g., *Blake*, 663 F2d at 279*; Montgomery Ward Co. v NLRB*, 385 F2d 760, 763-64 (8th Cir. 1967).

Id. at 978.

In this case, of course, there was not a charge and there was no allegation or complaint concerning any defect in providing information during the bargaining process. General Counsel will likely argue that there was a full and fair opportunity to litigate the issue at the hearing.

There was not notice to the Company that this was going to be an issue, it could have subpoenaed additional witnesses, it could have subpoenaed additional documents, it would have a fair opportunity to fairly prepare its defense of this issue. The fact that there was testimony about the issue would not put the Company on notice that it was being charged as a separate unfair labor practice because the testimony about what was discussed at the bargaining sessions would not be irrelevant or objectionable in the context of this hearing. Such testimony was relevant to an issue which had been charged and alleged in the Complaint – whether the parties had reached an impasse. Simply stated, trial by ambush is not permitted by the Board's rules, by the Administrative Procedures Act, or by statute.

2. The ALJ's Credibility Resolution is Entirely Unsupported by the Record and is Lacking in Any Reason of Analysis

When an ALJ's credibility resolution is so thoroughly contrary to the evidence and is based on such illogical and contradictory reasoning the Board is obligated to reverse it. The ALJ's credibility determinations are disregarded and they are "inherently unreasonable or self-contradictory." *NLRB v Randall-Eastern Ambulance Service, Inc.*, 584 F2d 720, 730 (5th Cir. 1978). The ALJ's credibility determinations are not upheld when they are based on inequitable reasons or no reasons at all. *NLRB v Moore Business Forms*, 574 F2d 835 (5th Cir. 1978).

In this case, testimony at the trial revealed two competing versions of what occurred. There was the Union's version as testified to by Mr. Sprague and Mr. Matthews that the Union asked for cost savings calculation data at <u>every</u> meeting and that it was only provided once and they specifically asked for documents and never received them. Then there was the Company's testimony that the Union asked about cost cutting information once, that the Company verbally supplied those numbers and the Union wrote them down. and that the Union never asked before or after that and never indicated any dissatisfaction with the response.

Rarely has there been a case where there is so much other evidence that is so decidedly in support of one version over the other. Rarer still is it that all of that evidence would be produced by the party whose position it does not support. And even rarer still is it that a finder of fact has gone so far out of her way to disregard all of that evidence.

Two affidavits supplied by the Union to the NLRB shortly after the bargaining ended fully contradict the Union's version and fully support the Company's version. The Union's bargaining notes prepared by the Union's witness during the bargaining sessions which they covered, fully contradict the Union's position and fully support the Company's position. Let that sink in. These documents produced by the Union's witnesses not only entirely contradict the Union's position, they fully corroborate what the Company says happened.

But that's not all. This Union which filed unfair labor practice charges five times never once mentioned any complaint about not providing cost cutting data in these charges. This Union which submitted two written information requests with 48 and 45 detailed items respectively never asked for this information in writing once. In fact, the very first time it was ever suggested that this Union felt it had not received the information requested was at the trial during the testimony of Mr. Sprague.

And why does the ALJ say she is going to disregard all of this evidence? She says that it is because on re-direct Mr. Sprague and Mr. Matthews testified that they did not mean to write down everything that happened in their affidavits and their bargaining notes. That is ridiculous. The fact is and the evidence overwhelmingly establishes that Mr. Dubrow's and Mr. Hendrickson's testimonies are accurate and Mr. Sprague's and Mr. Matthews' are not. Another reason the ALJ credits Matthews and Sprague is "neither Matthews nor Sprague claim to recall all of the details or dates regarding the bargaining sessions …". That's right, the ALJ points to

the Union's witnesses inability to recall details and dates as evidence that their testimony is credible. That's incredible. Then she says:

> "in fact notes taken by Sprague at a later session, and admitted into evidence, were sparse and clearly did not include all that was discussed when compared to the testimony of all the witnesses."

(ALJ Decision, p. 11.) According to the ALJ, the fact that Mr. Sprague took "sparse notes," at a July 26 bargaining session totally trumps the fact that neither he nor Mr. Matthews ever mentioned anything about asking for or receiving the information except in a way that is entirely consistent with the Company's position in the two affidavits and contemporaneous notes they took during the bargaining session. Sparse meeting notes at a July 26 bargaining session totally trumps the fact that the Union in five tries never once raised this issue when filing its unfair labor practice charges. Sparse meeting notes at a July 26 bargaining session totally trumps the fact that the Union which has a history of making written requests for information it wants never did so with regard to this issue. Not only do the sparse meeting notes, according to this ALJ, trump every one of those items, they trump all of them together. And by the way, the sparse meeting notes she is talking about were prepared by Mr. Sprague. The meeting notes that were taken during the course of negotiations and which fully corroborate the Company's position were made by Mr. Matthews.

In her decision, the ALJ makes the following statement:

> Finally, Respondent argues in its brief that the Union asked the cost savings information once during negotiations. I reject this argument since the Union is not required to repeat its request. Nor does the request have to be in writing.

This misses the point entirely. The Company's position is not that it was not required to provide the information requested because the Union only asked once, or because the request was not in writing. The Company's argument based on the facts established mostly by the

Union's own documentation, is that the Union asked once and the Company complied once and the Union never gave any indication that it wanted anything other than what information the Company provided. While the request does not have to be in writing, the fact that it was never put in writing bears on the credibility issue. Because the Union made other written requests for information and the fact that it did not do so this time is just one of the many strong pieces of evidence which show that things happened just as the Company says they did.

Any fair and reasoned analysis of the evidence can only lead to one conclusion – the Union asked once, the Company provided the information it asked for, and the Union never asked again.

3. The Union Never Asked for the Company's 2011 Tax Returns

It is not entirely clear, but it may be that at page 27 of her decision the ALJ finds another violation because the Company did not supply 2011 tax returns. There was no charge filed and complaint issued on this. And there is no evidence that the Union asked for the 2011 tax returns.

B. <u>There Is No Violation Of Section 8(a)(1) Or (5) Because The Company, At All Times, Bargained In Good Faith</u>

1. The Company Bargained in Good Faith to Impasse

From the first negotiations on February 27, 2012 through the hearing in this matter on May 21, 2013, the Company has bargained in good faith.

Whether parties have bargained in good faith is determined by examining the "totality of the circumstances." *NLBR v. Suffield Academy*, 322 F.3d 196, 198 (2d Cir. 2003). In making this determination, the Board reviews whether the party has:

1) Engaged in delaying tactics;
2) Made unreasonable bargaining demands;
3) Made unilateral changes in mandatory subjects of bargaining;
4) Engaged in efforts to bypass the union;
5) Failed to designate an agent with sufficient bargaining authority;
6) Withdrew already agreed-upon provisions; and

7) Arbitrarily scheduled meetings.

Atlanta Hilton & Towers, 271 NLRB 1600, 1603 (1984).

Applying these factors here, the record evidence shows only good faith bargaining on the part of the Company. The parties began meeting on February 27, 2012 and continued to meet until impasse. During this timeframe, the Company:

- Negotiated on twelve occasions by meeting, telephone calls, and exchanging correspondence with proposals.
- Participated in seven in-person meetings with the Union before implementing its proposal. (Tr. 227-28.)
- Provided the Union with seven proposals: General Counsel Exhibits 7, 11, 12, 13, 14, 15, and 16.
- Reached tentative agreement on several issues.
- Suggested having a mediator participate in meeting, which resulted in a mediator being present to facilitate negotiations with the Union at four meetings.
- Provided the Union with requested financial data.
- Had its negotiating team of Tom Hendrickson, Ryan Hendrickson, and Jack Dubrow attend all in-person meetings, so the Company had full bargaining authority.

There is no evidence to suggest that the Company engaged in delay tactics during negotiations, arbitrarily scheduled these meetings, or engaged in efforts to bypass the Union.

The Company also acted reasonably while making its bargaining demands. As discussed more fully below, the Company's proposals were not unreasonable or illogical. To provide support for its proposals, the Company met with the Union's accountant and provided its tax returns to him. (Tr. 49; *see* GC Ex. 49.)

Throughout the course of negotiations, the Company made concessions and revised certain proposals in the Union's favor. First, the parties reached tentative agreements, which

implemented by the Company on June 11, 2012. (*See* GC Ex. 9; *compare* GC Ex. 16.) Second, the Company agreed with the Union's proposals of eliminating super seniority and the vacation selection and notice provision. Third, the Company revised its own proposals by: reducing the proposed employee healthcare contributions from 25 percent to 15 percent; including language that the 401(k) match would be eliminated until the Company became profitable; and including language that the parties could seek any court remedies to enforce the CBA (versus the requirement of filing in the United States District Court for the Eastern District of Michigan).

Therefore, through review of the factors identified in *Suffield Academy*, which clearly weighs in the Company's favor, there cannot be any serious argument the Company bargained in bad faith.

2. The Company's Proposals did not Evidence Bad-Faith Bargaining

The Company's proposals leading to impasse, which include elimination of the 401(k) match, employee healthcare contributions, revision to overtime calculations, and elimination of the arbitration procedure, are not per se evidence of bad faith.

Accordingly, the Board does not second-guess the business judgment of the Company in making these proposals. The Company has the right to make them and can insist on them to impasse without violating the Act. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 409. The proper role and function of the NLRB is to act as a referee and to watch over the bargaining process and not dictate nor guarantee its results. *H. K. Porter v. NLRB*, 397 U.S. 99, 109, 90 S. Ct. 821, 25 L. Ed. 2d 146 (1970); *see also Rescar Inc.*, 274 NLRB 1, 2 (1985), "[I]t is not the Board's role to sit in judgment of the substantive terms of bargaining, but rather to oversee the process to ascertain that the parties are making a sincere effort to reach agreement.")

Even if the proposals appear regressive or unpersuasive, the question is whether the reasons advanced for the proposals are "so illogical as to warrant an inference that ... Respondent has evinced an intent not to reach agreement ... in order to frustrate bargaining." *Phelps Dodge Specialty Cooper Products Co*., 337 NLRB 455, 457 (2002) (citing *Hickinbotham Bros. Ltd*., 254 NLRB 96, 102-03 (1981)); *see also National Steel & Shipbuilding Co*., 324 NLRB 1031, 1044 (1997).

The only proposal with which the ALJ takes issue is the Company's proposal to have grievances ultimately decided in Court. Here is the first reason the ALJ says this proposal evidences bad faith:

> Respondent offered several reasons for wanting to go to court versus arbitration, most of which defied logic. First, Respondent said that arbitration would be far more costly and less efficient than going to court. T. J. Hendrickson said that arbitration was more costly because they would have to -fly people in from all over the place,- and that as in-house counsel it would be part of his job to go to court. He indicated that he had more court experience, but offered no reason he could not handle arbitration.
>
> * * *
>
> Further. the proposal for a trial in court in lieu of arbitration is not only contrary to Respondent's goal to control costs, but it goes against generally accepted opinion that it is normally far less costly and expeditious to go to arbitration than to take a dispute into any type of court.

(ALJ's Decision, p. 30.) Of course, there was no evidence to support what the ALJ called "generally accepted opinion" and her "analysis," totally misses the point. The reason court is expensive is because companies have to incur legal fees. In the Company's estimation that would not be true here because Mr. Hendrickson is an employee of the Company, already on the payroll, licensed as an attorney to practice in federal and state courts in Michigan, and thus he could handle any court litigation without any extra cost. The cost that the Company would avoid

by letting a court resolve disputes as opposed to an arbitrator is the cost of the arbitrator. Arbitrators in this area generally charge at least $1,000 per day and in total bills for conducting a hearing and writing an opinion generally run several thousands of dollars. That is the cost that the Company would avoid with its proposal and the ALJ's reliance on some generally accepted opinion which does not remotely apply to the facts of this case is what defies logic here.

Then the ALJ cites *Collyer Insulated Wire*, 192 NLRB 837, 843 (1971); *Steelworkers v. Warrior & Gulf Nay*, Co., 363 U.S. 578 (1960):

> Since arbitration has been deemed an essential part of collective bargaining [therefore], Respondent's demand to remove it. Along with its refusal to supply requested information, taints and frustrates the bargaining process.

(ALJ's Decision, p. 30.) Thus, the ALJ's decision is apparently based on her view that the Board and the Supreme Court have mandated arbitration for contracts. That is not the law.

Next, the ALJ states that the Respondent's proposal on dispute resolution somehow amounts to a requirement that employees waive their right to file charges with the Board. The cases the she cites in support of this surprising finding of course had nothing to do with the facts here. In *Athey Products Corp*, 303 NLRB 92 (1991), the language at issue specifically said:

> The company and the union mutually agree that a condition precedent to the invocation, processing, or arbitration of agreements is that the union and/or any employee or employees involved must agree that this grievance and arbitration procedure is the exclusive avenue by which the grievance must be resolved, make sure the union and/or any employee or employees file a charge with any federal or state agency, the union and/or the employee or employees shall be prohibited from processing or arbitrating any grievance hereunder which is based on the same or similar facts.

The ALJ also cites *Isla Verde Hotel*, 259 NLRB 496 (1981) in support of this proposition. In that case, as a condition to returning to work from strike, the employer required the employees to sign a letter waiving "any claim that the union or any other person may be

making on my behalf both with the agencies of the Commonwealth of Puerto Rico as well as the federal government." In *Reichhold Chemicals*, 288 NLRB 69 (1988), the Board revised its prior position that a no strike clause could include a waiver of the right to access Board processes in connection with enforcement of the no strike clause. In *Retlaw Broadcasting Company*, 310 NLRB 984, another case the ALJ cites to support this proposition, the employer had conditioned reinstating an employee on the employee's agreement to waive any union representation in the future.

The dispute resolution procedure that the Company proposed does not require employees to waive anything. It does not even include the familiar language typically included in arbitration provisions that the procedure is "exclusive and binding." With regard to the availability of the judicial remedy, it only states that the matter "may be submitted" to a court proceeding. The ALJ's attempt to stretch the case as she cites to fit the facts of this case is one more example of the fault analysis she employs throughout.

None of the reasons for its proposals is "so illogical" as to warrant an inference that the Company attempted to frustrate bargaining by raising the proposals. While the Administrative Law Judge may question the persuasiveness of the Company's proposals, the business reasons for the proposals are supported by record evidence and should not be second-guessed. As such, the Board cannot establish bad-faith bargaining based upon the Company's actual proposals.

3. The Company Lawfully Implemented Its Own Proposals After the Parties Reached True Impasse

The Company and the Union reached true impasse when, after good-faith bargaining, they were unable to resolve the proposals related to the elimination of the 401(k) match, employee healthcare contributions, revision to overtime calculations, and dispute resolution. Consequently, the Company could then implement its own proposals.

Impasse has been defined as "that point at which the parties have exhausted the prospects of concluding an agreement and further discussion would be fruitless." *Laborers Health & Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n. 5 (1988) (quoting *Laborers Health & Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.*, 779 F.2d 497, 500 n. 3 (9th Cir. 1985); *American Federation of Television & Radio Artists v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968) ("As we see it, the Board's finding of impasse reflects its conclusion that there was no realistic possibility that continuation of discussion at that time would have been fruitful.") Put another way, impasse exists not simply when "both parties believe that they are at the end of their rope," but when "the parties are *warranted* in assuming that further bargaining would be futile." *PRC Recording Co.*, 280 NLRB 615, 635 (1986), enfd., 836 F.2d 289 (7th Cir. 1987) (emphasis added); *Pillowtex Corp.*, 241 NLRB 40, 46 (1979).

Furthermore, "while the state of affairs that constitutes an impasse is not subject to precise definition, at least it encompasses the notion that both sides are aware of precisely what is at issue and that they have made more than a perfunctory attempt to reach a solution." *Blue Grass Provision Co. v. NLRB*, 636 F.2d 1127, 1130 (6th Cir. 1980) (citing *Taft Broadcasting Co.*, 163 NLRB 475 (1967)). Expanding on the circumstances under which impasse exists, the Board in *Taft* stated the following:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Id. at 478.

As of June 13, 2013, all of the following things were true:

- The Union membership had approved a strike;
- Mr. Sprague had voiced his opinion that it might be better for the Company to close than to accept the Company proposals;
- The Company presented its last best final offer;
- Mr. Sprague informed the Company that its offer was "totally unacceptable" and that "there was no way" it was "going to be accepted."
- The Union presented its own final offer which stated that if the Company did not accept it, the Union would strike.

According to the ALJ, there was not really an impasse because the Union did not really mean it. Her decision is essentially that the Union harbored a secret willingness to move closer to the Company's proposal. Thus, apparently the ALJ's belief is that federal labor law requires an employer to disregard what a union does, what it says, and what it communicates in writing, and instead engage in some metaphysical exercise to determine what really is going on deep inside the minds of the union representatives. There is not any case law to support that position.

It is also worth noting that this Union which was secretly willing to move on its position could have done so at the July 26, 2012 meeting, but did not. In fact, it could have made a new proposal at any time, but it never did.

Perhaps the most telling undisputed facts in regards to the Union's state of mind on impasse is that on three of the four unresolved issues, the Union insisted its own position from the very beginning without change. It insisted on arbitration, it insisted on overtime over 8 hours, it insisted on no change to the 401(k). It never changed its position on any of those issues. On the health insurance issue, it proposed a $15.00 co-pay on April 27, but then insistent it would go no further, and never did.

4. The Company Continued to Bargain in Good Faith Following Impasse

a. The Company Did Not Refuse to Bargain in 2012

The fundamental flaws in the ALJ's credibility determination about the phone call Mr. Ryan had with Mr. Sprague in early December 2012 were detailed in the fact section of this brief and will not be repeated. Here are all of the undisputed facts about this allegation one time:

- During a telephone conversation in early December 2012, Mr. Sprague declined to meet and said he preferred to have the labor board decide.
- In December 2012, the Union had initiated proceedings to remove Mr. Sprague from his position as President of the Local. (Tr. 387.)
- In January 2013, Mr. Ryan made two calls to the Union office to try to arrange bargaining dates. On the second call, he spoke to Bill Bernard and was told that Mr. Bernard could not agree to a meeting. (Tr. 387-388.)
- In January 2013, Mr. Ryan contacted Patricia Fedewa, the Board Attorney assigned to this case to ask if she knew who he could contact about bargaining dates. (Tr. 388.)
- Based on Ms. Fedewa's recommendation, Mr. Ryan contacted the Union's attorney, John Canzano, in person, by telephone, and through e-mail all in an effort to schedule bargaining dates. (Tr. 388-390, R-30.)

The undisputed evidence is that there was only one person taking any initiative to try to resolve bargaining. That was Mr. Ryan, the Company's lawyer. To come to the conclusion that the ALJ did on this issue requires that all of this undisputed evidence was ignored.

C. The Board Cannot Establish Any Violations Of Section 8(a)(1) Or (3) For The Company's Decision Not To Immediately Reinstate Economic Strikers

Because the Company bargained in good faith and lawfully implemented its own proposals following impasse, and the strikers based their vote to strike on economic issues, the strikers engaged in an economic strike. Consequently, the Company lawfully hired permanent replacement employees and lawfully decided not to immediately reinstate the strikers upon their offer to return to work on November 30, 2012.

In order for an unfair labor practice strike to exist, there must be an underlying unfair labor practice committed by the employer. *Sunbelt Enterprises,* 285 NLRB 1153 (1987); *see also Blue & White Cabs*, 291 NLRB 1049, 1064 (1988). It is equally clear under Board law that there must be a *causal connection* between the alleged unfair labor practices and this strike itself in order to establish an unfair labor practice strike. As the Board has often stated:

> An unfair labor practice strike does not result merely because unfair labor practices precede the strike. Rather there must be a causal connection between the two events which demonstrates that the strike is the direct outcome of the unfair labor practices.

John Cuneo, Inc., 253 NLRB 1025, 1026 (1981), enfd., 681 F.2d 11(D.C. Cir. 1982), *cert. denied*, 459 U.S. 1178 (1983); *Keller Mfg. Co.*, 272 NLRB 763 (1984).

It is axiomatic as well that employees are aware of the unfair labor practice before a strike can be deemed an unfair labor practice strike. The Board often examines a union membership's consideration of issues at a strike vote in determining whether a strike is an unfair labor practice strike. In *Mobil Homes Estates, Inc.,* 259 NLRB 1384 (1982), enfd. on other grounds, 707 F.2d 264 (6th Cir. 1983), the administrative law judge found that prior to a strike, the employer committed several unfair labor practices including encouraging an employee to refrain from striking and attempting to encourage an employee to resign from the union. *Id.* at 1397. Nonetheless, the administrative law judge found the strike was economic because the

unlawful statements were made the day before the strike began but after three strike votes had been held. *Id.* at 1402. The NLRB affirmed this decision.

Similarly, in *Facet Enterprises, Inc.*, 290 NLRB 152 (1988), enfd. on other grounds, 907 F.2d 963 (10th Cir. 1990), the NLRB found that a strike was converted to an unfair labor practice strike based upon an unlawful bargaining proposal made by the employer before the strike. When the original strike vote was taken, during that meeting, the union's president handed out a list of unresolved issues, which did not mention the unlawful proposal. Based on these facts, the Board concluded:

> [T]he membership was informed of the Respondent's position on the [unlawful proposal] and voted to confirm their representatives rejection of the Respondent's final offer and remain on strike. We do not dispute the notion that Union employees may give standing authorization to their bargaining agents to commence a strike in response to what those agents believe is an employer's unfair labor practice. But we find no evidence that such generalized authority was given by the rank-and-file employees to the Local's Officers either at the October 11 meeting, when the employees approved the strike authorization, or at any time before. In requesting the strike vote, the only grounds offered by the Local's Officials dealt with economic issues.

Id. at 154.

In *Christopher Construction Company, Inc.*, 288 NLRB 1272 (1988), the day after the strike began, striking employees were told that if they did not report for work the following Monday, the company would consider them to have quit their jobs. *Id.* at 1275. The employees who did not return to work the following Monday were listed on their employment records as "quit-struck for union," which was found to be an unfair labor practice. *Id.* The administrative law judge concluded that the strike was an economic strike despite the subsequent unfair labor practice, noting that "the record contains no evidence that the strikers ever discussed the

discharges or that they ever concertedly considered the discharges a reason to prolong the work stoppage." *Id.* at 1276.

In another case involving strike vote meeting, the Board overruled the administrative law judge's finding of an unfair labor practice strike. In *Reichhold Chemicals*, 288 NLRB 69 (1988), *rev'd*, 906 F.2d 719 (D.C. Cir. 1990), *on remand*, 301 NLRB 706 (1991), the Board found that the employer violated Section 8(a)(5) by proposing a waiver of access to the Board by union members in its no-strike proposal. The Board noted the union conducted two strike votes and although contract proposals were discussed in detail, the waiver of access issue was not specifically mentioned. The Board rejected the union president's general discussion of the company's "unreasonable and outrageous" proposals as insufficient to establish that one of the reasons for the strike was the desire to protest the access proposal. In this regard, the Board said:

> ... the information on which the employees acted when they voted to strike is what is crucial in determining if there is a causal connection between the Respondent's insistence on a waiver of employees' rights to go to the Board and their determination to strike.

Id. at 73 (emphasis added).

Furthermore, in the context where the union knows its articulated reasons for striking will determine its members' recall rights, a finder of fact should carefully distinguish facts demonstrating true motivation from efforts by the union at revisionist history. *See C-Line Express*, 292 NLRB 63 (1989) ("[I]n examining the union's characterization of the purpose of the strike, the Board and the court must be wary of self-serving rhetoric of sophisticated union officials and members inconsistent with the true factual context"); *Pirelli Cable Corp. v. NLRB*, 141 F.3d 503 (4th Cir. 1998). As noted by the Fourth Circuit in *Pirelli*:

> An unfair labor practice strike is a sword to be used by Union members to vindicate violations of their rights under the NLRA; it

> is not a shield to protect their jobs from the potential legitimate consequences of an economic strike.

Id. at 519. This is particularly true when, as in this case, the union's strike fails to cause the employer to accede to the union's economic demands and the employer successfully hires permanent replacement workers.

In this case, the unfair labor practice upon which the Union claims that it decided to strike involves the Company's alleged failure to bargain in good faith. First and foremost, as discussed above, because the Company bargained in good faith and lawfully implemented its own proposals following impasse, the Union's strike was not an unfair labor practice strike.

Second, the Union's strike vote was based solely on economic factors, and the Union never engaged in a subsequent vote to continue its work stoppage because of any unfair labor practice.[5] The Union's June 25, 2012 strike was based on one vote, which was taken on April 30, 2012 – only after the parties' third bargaining meeting. At the time of the strike vote, the Union also voted down the Company's proposals on the arbitration provision, 401(k) match, overtime calculations with a 40-hour work week, and employee healthcare contributions. (*See* GC Ex. 12.) There was no record evidence that the Union considered any unfair labor practice such as bad-faith bargaining at the time of the April 30, 2012 strike vote; nor was there any record evidence that the Union took a second vote to continue its strike because of the Company's alleged bad-faith bargaining. In fact, one of the strikers, Scott Hawkes, testified about the reasons for the strike:

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[5] There are certain types of unfair labor practices that, by their very nature, may convert an economic strike to an unfair labor practice strike. These types of unfair labor practices are not applicable here. *See, e.g. C-Line Express*, 292 NLRB 638, 639 (1989) (finding economic strike converted to unfair labor practice strike with unlawful withdrawal of recognition, withdrawal of contract proposals, refusals to meet and bargain, and recognition of another union); *Chicago Beef Co.*, 298 NLRB 1039 (1990) (finding economic strike converted to unfair labor practice strike when the employer required resignation of union membership as a condition of reinstatement).

Q. And you knew you would be willing to strike to get what you wanted in the contract?

A. We didn't want anything. We just didn't want anything taken away. We didn't ask for anything.

Q. You were willing to strike to keep the old contract in force?

A. Yes.

(Tr. 245.) His testimony as to the cause of the strike exclusively articulated economic reasons.

Because the evidence demonstrates that the Union's strike was purely based on economic reasons, the Company did not violate Sections 8(a)(1) or (3) of the Act when it hired permanent replacement employees and did not immediately return the strikers to work on November 30, 2012.

D. <u>The Board Cannot Establish Any Violation Of Section 8(a)(5) With The Company's Responses To Information Requests</u>

While there was no need for the Company to respond to the Union's July 31, 2012 information requests as the CBA had expired, the Company, nonetheless, fully responded.

Although the employer has a duty to furnish information, it must only do so if the information requested is both relevant and "of use to the union in carrying out its statutory responsibilities." *See e.g. NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967). The Union's requests for information must also be made in good faith. *See Detroit Edison Co. v. NLRB*, 440 U.S. 301, 320 (1979). Moreover, the Union's bare assertion it needs the information to process a grievance does not automatically oblige a company to supply the information. *See Detroit Edison Co.*, 440 U.S. at 314.

Here, the Company fully satisfied the Union's need for information set forth in the July 31, 2012 information requests. The Company responded to the Union's information requests related to AGG Trucking and the permanent replacement employees when the Company: 1)

informed the Union on January 9, 2013 that AGG Trucking and the Company were a single employer (*see* R. Ex. 12.) – which the Union had already acknowledged when the "AGG Trucking" logos appeared on the Company's trucks and were soon thereafter removed; 2) responded to the subsequent December 27, 2012 information requests on January 9, 2013 with information related to the permanent replacement employees (*see id*.); and 3) provided Mr. Canzano with payroll information on April 10, 2013 (Tr. 395).

The Union acknowledged the sufficiency of these responses. Mr. Canzano only requested the payroll records when Mr. Ryan and Mr. Canzano discussed the outstanding information requests and the sufficiency of the responses; and those payroll records were produced. (Tr. 395.) More importantly, Mr. Mathews testified that that the Union no longer needed any information about AGG Trucking once it received Mr. Ryan's January 9, 2013 letter: "After I got the letter from him, no, I didn't need the information anymore, I don't believe." (Tr. 213.) Mr. Mathews explained that the Union no longer needed the information because the Company removed the name "AGG Trucking" from the trucks. (*Id*.) *See e.g. Glaziers Wholesale Drug Co.*, 211 NLRB 1063 (1974) (noting that when an information request is rendered moot by subsequent events, the employer has no statutory obligation to furnish information).

Therefore, because the Union admitted that the Company sufficiently responded to its July 31, 2012 information requests, the Board cannot establish that the Company failed to respond in violation of Section 8(a)(5).

E. <u>The Remand To The ALJ Does Not Cure The Defect</u>

In its decision in *National Labor Relations Board v Noel Canning*, 573 U.S. ____ (2014), the United States Supreme Court held that the three recess appointments President Obama made to the National Labor Relations Board on January 4, 2012 were invalid. The consequence of the

Supreme Court's decision is that between January 4, 2012 and August 20, 2013 when the Senate confirmed the three nominees, the Board consisted of two members and therefore was without any authority to act in that respect.

Pursuant to Section 4 of the NLRA, 29 U.S.C. § 154, the Board has the authority to appoint "examiners." Pursuant to Section 10(b) of the Act, 29 U.S.C. § 160(b), a hearing must be conducted by an "agent" of the Board. Pursuant to its rule making authority the Board has promulgated 20 CFR § 201 which states in relevant part:

> "The Board appoints administrative law judges and subject to the provisions of the Administrative Procedure Act Section 4(a) of the National Labor Relations Act, exercises authority over the division of judges."

Donna Dawson, the person who conducted the hearing, purported to act in the capacity of an Administrative Law Judge and issued the Decision and Recommended Order in this case was "appointed" on April 13, 2013. Thus, she was appointed at a time when the Board had only two members and no lawful authority to act. All actions she has taken in this case have been without lawful authority, and the Board, therefore, has no lawful authority to take action with respect to her Decision and Recommended Order. The remand does not cure this. The hearing was required to be conducted by a duly-appointed agent of the Board. In this case, it was not. The record that exists is the product of evidentiary and procedural rulings made by a person who had no authority to do so. She questioned witnesses without any right to do so. And those questions and answers are part of the record. By sending this case back for her ratification, the Board has cured nothing.

Also, the Acting General Counsel had no lawful authority to prosecute the case. *NLRB v Kitsap*, 2013 U.S. Dist. Lexis 114320 (2013).

F. If The Case Is To Be Remanded, It Must Be For A New Hearing With A New ALJ

As stated in *Indianapolis Glove Company*, 88 NLRB 986, 987 (1950), "[I]t is essential not only to avoid actual partiality and prejudgment... in the conduct of Board proceedings, but also to avoid even the appearance of a partisan tribunal. *See also The New York Times Company*, 265 NLRB No. 45 (1982); *Filmation Associates, Inc.*, 227 NLRB 1721 (1977); *The Center for United Labor Action*, 209 NLRB 814 (1974). The proceedings in this matter fall far short of this standard.

It is undisputed in this case that at the time ALJ Dawson presided over this matter, she had no authority to do so. Lacking any authority, ALJ Dawson nonetheless conducted this hearing, reviewed evidence, made credibility determinations, and issued an opinion. Respondent objected and the Board's response was simply to send this matter back to the same ALJ for a rubber-stamp approval of her previous opinion. This does not cure the defective proceeding below. Respondent is entitled to a new trial, with a new impartial ALJ.

The Court in *Hannah v. Larche, 363 U.S. 420, 442, 4 L. Ed. 2d 1307, 80 S. Ct. 1502 (1960)* addressed the issue of partiality and prejudgment in administrative proceedings:

> Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.

306 F.2d at 263 (footnote omitted). The court concluded that quasi-judicial proceedings must entail, "at the very least," a fair trial, quoting *In re Murchison, 349 U.S. 133, 136, 99 L. Ed. 942, 75 S. Ct. 623 (1955)*:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of

> cases. But our system of law has always endeavored to prevent even the probability of unfairness."

306 F.2d at 263. *Hannah* was a civil rights case and *Murchison* was a criminal case, yet the court turned to them for guidance in determining what process is due in administrative proceedings of a judicial or quasi-judicial nature. They are likewise instructive here.

In this matter, the ALJ has, in fact, predetermined the outcome of this matter before she was lawfully authorized to do so. Undoubtedly, she has approached this matter with a "closed mind" after the remand, and would again if she presided over the new hearing. She has already demonstrated this by rubber-stamping her previous opinion with no consideration of Respondent's arguments. In such cases, the Board must do what is necessary "to avoid even the appearance of a partisan tribunal"—which includes removal of an ALJ. *Dayton Power & Light*, 267 NLRB 202, 203 (1983). In *Dayton Power*, the Board remanded a case to a different ALJ when it was clear the ALJ had already made up his mind about the merits of the case. *Id*. At 203-204. A similar result is warranted here. *See also Distr. No. 1, Pacific Coast Engineers Beneficial Assoc.*, 274 NLRB 1481, 1481-1482 (1985) (Disqualification of ALJ appropriate where ALJ's conduct demonstrates hostility towards a party.)

Every code of conduct that governs judicial and quasi-judicial proceedings contains strong statements which reiterate the importance of maintaining the appearance of impartiality:

The Board's own statement of procedure demands another ALJ be appointed. NLRB 101.10(b) provides:

> "The functions of all administrative law judges and other Board agents or employees participating in decisions in conformity with section 8 of the Administrative Procedure Act (5 U.S.C. § 557) are conducted in an impartial manner and any such administrative law judge, agent, or employee may at any time withdraw if he or she deems himself or herself disqualified because of bias or prejudice…."

[Cite decision in email]

Application of the Model Code for Federal Administrative Law Judges leads to the same result. Canon 2(A) of the Model Code for Federal ALJs provides:

> An administrative law judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the administrative judiciary.

The commentary underscores the importance of adhering to this standard:

> Public confidence in the administrative judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on his or her conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

Judicial Cannon of Ethics would prohibit ALJ Dawson from rehearing this matter. The statute governing federal judges, if applied here, would also mandate a different ALJ be appointed. 28 U.S.C. § 455(a) provides:

> Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

While this statute has been held not to apply to ALJs in previous decisions, the Board itself has recognized that the standard for judging impartiality of its ALJs is interpreted similarly. *Greenberg v. Board of Governors of the Federal Reserve,* 968 F.2d 164, 167 (2d Cir. 1992).

The Code of Administrative Procedures mandates a different ALJ be appointed. 5 USC § 554(d)(2) provides in pertinent part:

> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557

> of this *title [5 USCS § 557*], except as witness or counsel in public proceeding.

The Board recognized in its decision to remand the case, that ALJ Dawson was not properly appointed and was not, therefore, authorized to hear this matter. Her resulting involvement amounts to an investigative function for the Board. Thus, she is precluded from subsequently recommending a decision or issuing one.

In an administrative forum, a showing of "actual bias" or "actual" partiality before recusal will be required. *Robbins v. Ong,* 452 F. Supp. 110, 116 (S.D. Ga. 1978) (citing *Megill v. Board of Regents of State of Florida,* 541 F.2d 1073, 1079 (5th Cir. 1976); *Caterpillar Inc*., 321 NLRB 1130, 1132-1134 (1996); *Detroit Newspapers*, 326 NLRB 700, 710 (1998). An ALJ may be disqualified where her previous, public statements reveal that she has "adjudged the facts as well as the law of a particular case in advance of hearing it" and "made up her mind about important and specific factual questions and . . . [is] impervious to contrary evidence." *Steelworkers v. Marshall,* 647 F.2d 1189, 1209 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981) (citations omitted). The alleged bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp*., 384 U.S. 563, 583, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966). Opinions formed from facts or events arising during the current or prior proceedings are grounds for a recusal motion if they display deep-seated favoritism or antagonism. *See Liteky v. United States,* 510 U.S. 540, 556, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994); McClure, 456 U.S. at 195-96.

There should be a new hearing and Judge Dawson cannot preside over it. Based on her involvement in the first defective hearing, she has certainly already made up her mind and the

new hearing would be nothing more than a sham. Hendrickson Trucking was entitled to have its case heard before a lawfully appointed agent of the Board, and it has not had that yet.

IV. CONCLUSION

For all of the foregoing reasons, Respondent Hendrickson Trucking Company respectfully requests that the unfair labor practice charges against it be dismissed.

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Dated: May 9, 2016

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CERTIFICATE OF SERVICE

On this 9th day of May, 2016, the undersigned did cause to be filed the foregoing document with the NLRB using the e-filing system at www.nlrb.gov, and upon Patricia Fedewa, Counsel for the Acting General Counsel, via e-mail at patricia.fedewa@nlrb.gov.

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